No. 89-564

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MAURICE AND DOLORES GLOSEMEYER, et al.,
Petitioners,
vs.
MISSOURI-KANSAS-TEXAS RAILROAD, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

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INTRODUCTION

The brief filed on behalf of the Missouri-Kansas-Texas Railroad, the State of Missouri, and a group of organizations interested in expropriating a recreational trail over land owned by the Petitioners (the Property Owners)[1] simultaneously (and somewhat schizophrenically) admits the commonality of issues in this case and *Preseault v. ICC*, no. 88-1076, which was recently argued in this Court, yet seeks to deny sufficient kinship between the cases to treat them the same. The appropriate response appears in the brief filed by the Solicitor General (which does not oppose the Petition):

[1] Their joint brief will be referred to as the Railroad Brief.

> "As petitioners note (Pet. 11), this case raises the same questions that are before this Court in *Preseault v. ICC*, cert. granted, 109 S.Ct. 1929 (1989). The Court heard oral argument in *Preseault* on November 1, 1989. Accordingly, we agree with petitioners' suggestion (Pet. 26) that this case should be held pending the Court's decision in *Preseault v. ICC*, and disposed of in light of that decision." (Memorandum for the United States 4-5)

Nothing in the Railroad Brief disputes the national importance of the issues in this case, as already recognized by this Court when it granted certiorari to consider those same issues in *Preseault*. As acknowledged by the United States in its Memorandum quoted above, the issues merit the same treatment as in *Preseault*.

1. THE RAILROAD BRIEF IS BASED ON A REFUSAL TO RECOGNIZE REALITY

Fundamentally, the Railroad Brief is founded in unreality.

The Railroad Brief's failure to analyze this case in the real world is nowhere more clearly demonstrated than in its conclusion that the creation of recreational trails was *not* the primary reason for the adoption of the "rails-to-trails" scheme (16 USC §1247[d]).

The legislative history of the "rails-to-trails" scheme is outlined in the Petition (pp 8-10, 20-24). It is clear that the main purpose of the statute was to override contrary state law and permit the conversion of

abandoned railroad rights-of-way to recreational trails. As the ICC put it:

> "This language demonstrates that the *main purpose of the amendment* is to *remove reversion as an obstacle* that hinders or prevents the successful conversion of entire linear rights-of-way *to recreation use* when the rights-of-way have been operated under easements for railroad purposes." (*Rail Abandonments — Use of Rights-of-Way as Trails* [1986] 2 ICC 2d 591, 597 [emphasis added].)

In stark contrast to the ICC's straightforward reading of the statutory scheme, the Railroad Brief concludes that "It is only *coincidental* that trail interests are also served." (Railroad Br. 12; emphasis added.)

"Coincidental"?!? It was the basic purpose of the statute. That is why the statute appears as part of the National Trails System Act.

The Railroad Brief further departs from reality in its discussion of the ICC's abandonment authority under 49 USC §10903.

As noted in the Petition, *before* the ICC even considers whether to authorize negotiations for the conversion of a railroad right-of-way to a recreational trail, the ICC is statutorily *required* to make a finding that the right-of-way is *not* necessary ". . . for present *or future* public convenience or necessity." (49 USC §10903; emphasis added.)

As the ICC most recently expressed it:

> "In *every* Trails Act case, we will *already* have found that the public convenience and necessity permit

> abandonment . . ." (*Rail Abandonments; Use of Rights-of-Way as Trails; Supplemental Trails Act Procedures* [1989] 54 Fed Reg 8011, 8012, fn 3; emphasis added.)

Thus, as written and applied, the "rails-to-trails" scheme operates only *after* the ICC concludes that there is *no future railroad need* for the right-of-way being abandoned. That conclusively demonstrates that the fiction relied on by the Railroad Brief (*i.e.*, that the statute is designed primarily to preserve rights-of-way for future railroad use) is just that — fiction. If the ICC believes that there *is* a future railroad need for the right-of-way, it is statutorily prohibited from authorizing abandonment.

Here, as is typical in "rails-to-trails" conversion cases, the ICC authorized abandonment, after making a finding of no future railroad need. (App C, pp 8, 10, 18)

The Railroad Brief offers two reasons to ignore the plain wording and operation of these statutes. First, the ICC is said to be wrong in its interpretation (a proposition with which no court has agreed) (Railroad Br. 13, fn 11); or, second, the finding of no future public need is made only to relieve the railroad of the cost of continued ownership of the right-of-way (Railroad Br. 13).

Neither of those strained rationalizations undercuts the ICC's correct reading of clear statutes that, before permitting abandonment, the ICC must determine that there is no future railroad need for the right-of-way and that a "rails-to-trails" conversion cannot be made until after an ICC determination that abandonment is appropriate.

2. THE RAILROAD BRIEF'S DISCUSSION OF THE AVAILABILITY OF COMPENSATION IN THE CLAIMS COURT IGNORES ALL PERTINENT AUTHORITY

While asserting that the Property Owners can seek just compensation in the Claims Court if any taking is effected by the "rails-to-trails" scheme (Railroad Br. 23), the Railroad Brief ignores settled decisions of this Court and the Claims Court (discussed in the Petition) which demonstrate the contrary:

- The Railroad Brief makes no mention of *Hooe v. U.S.* (1910) 218 US 322 or *Leiter v. U.S.* (1926) 271 US 204, which hold that when Congress expressly restricts appropriations for a program, any action under that program which requires the expenditure of unappropriated funds is not authorized by Congress and there can be no recovery in the Claims Court.
- The Railroad Brief makes no mention of *Southern Cal. Financial v. U.S.* (Ct Cl 1980) 634 F 2d 521, in which the Claims Court held that an action cannot be maintained in the Claims Court to recover just compensation for the consequences of actions for which Congress has refused to appropriate funds.
- The Railroad Brief makes no mention of *Hodel v. Irving* (1987) 481 US 704, in which this Court struck down as unconstitutional a statute which took property

interests but which did not provide any compensation for the interests taken.

No reasoned discussion of the Claims Court issue can be made without discussing these cases. The Railroad Brief's assertive prose, unblemished by relevant case citation and discussion, is of no use to this Court in its deliberations.

3. THIS IS A *PHYSICAL* INVASION CASE. PROPERTY WHICH WOULD OTHERWISE BE PRIVATE IS SUBJECTED BY STATUTE AND ICC ACTION TO USE BY UNKNOWN AND UNINVITED MEMBERS OF THE GENERAL PUBLIC

Despite the reluctance of the Railroad Brief to acknowledge it, this is a physical invasion case.

As briefed in the Petition, Missouri law provides that, when a railroad right-of-way easement is abandoned,[2] full use and enjoyment of the property are returned to the underlying fee owner. It is undisputed that no railroad use has been made of this easement since 1986. (App C, p 3)

Thus, absent the attempted pre-emptive effect of 16 USC §1247(d), the Property Owners have a present right to possess the easement area. However, because of 16 USC §1247(d), the Property Owners face the prospect of

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[2] This Court has defined "abandonment" as follows:

> "An abandonment 'is characterized by an intention of the carrier to cease permanently *or indefinitely* all transportation service on the relevant line . . .' " (*Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.* [1981] 450 US 311, 314, fn 2; emphasis added.)

unknown numbers of unknown members of the general public trespassing on their property. That is as much a physical invasion as was present in *Kaiser Aetna v. U.S.* (1979) 444 US 164 [public access to private marina], *Nollan v. California Coastal Commn.* (1987) 483 US 825 [public access to private beach], or *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 US 419 [cable TV access to an apartment building].

This Court has described the Fifth Amendment's Taking Clause as providing protection to property owners against "... an interloper with a government license." (*FPC v. Florida Power Corp.* [1987] 480 US 245, 253) In similar fashion, Professor Tribe has described this Court's decision in *Kaiser Aetna* as intended to protect private property owners from "... government-invited gatecrashers...." (Tribe, *American Constitutional Law* [2d ed 1988] §9-5 at 602)

Those descriptions fit this case like the proverbial glove. Although the Property Owners are entitled to exclusive use and possession of the property (since railroad use has terminated) the government has invited and purported to license the public to use the Property Owners' land as though it were public. That the government cannot do without compliance with the Fifth Amendment.[3]

The changed situation created by the statute was aptly described by the Supreme Court of Washington when it

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[3] Even with respect to the railroads which it regulates, the ICC cannot compel the donation of a right-of-way to a public agency for some public purpose (*Burlington Northern, Inc. Abandonment* [1972] 342 ICC 446, 453) or delay more than temporarily the issuance of a certificate of abandonment (*Lehigh & N.E.R. Co. v. ICC* [3d Cir 1976] 540 F 2d 71) without violating the Fifth Amendment.

responded to arguments almost identical to those being made here by the Railroad Brief (*i.e.*, that a "rails-to-trails" conversion scheme has no effect on the Property Owners because they already had a railroad easement on their land):

> "Defendants' second contention is somewhat startling. The argument that the statutes are valid because they do not 'eliminate' plaintiffs' reversionary interests strains credulity. Without the statutes, the holders of the reversionary interests would absolutely and automatically obtain possession of the easements upon railroad abandonment. Under the statutes, they would not." (*Lawson v. State* [Wash 1986] 730 P 2d 1308, 1313)

Thus, it is presumptuously wide of the mark for the Railroad Brief to assert that the "presum[ed] . . . reason" for the Property Owners' Petition is the Property Owners' belief that the "rails-to-trails" scheme "is a significant factor in preserving a major corridor." (Railroad Br. 15) The reason for this Petition is that the "rails-to-trails" scheme takes from the Property Owners something which is theirs: unfettered possession of an abandoned railroad right-of-way. Instead of being able to use their property, the Property Owners have been told by Congress to stand by in uncompensated silence while uninvited members of the public use their property at will.

The "rails-to-trails" scheme is a physical taking of the easement area. As that is done without compensation, the attempted transformation of private property into public property is void.

CONCLUSION

The issues in this case are of national importance. While continuing to authorize "rails-to-trails" conversions, the ICC has refused to take any position on the rights of property owners who are adversely affected by such conversions. As the ICC put it:

> "Given the fact that the compensation issue is still being actively litigated . . ., we have decided not to take any position on the merits of the different interpretations at this time. Nor will we attempt to establish parameters for when a compensible taking might occur." (54 Fed Reg at 8013)

The position urged in the Solicitor General's memorandum is the sensible one: action on this Petition ought to be delayed pending this Court's decision of *Preseault*. If *Preseault* is decided on its merits, then this case deserves consistent treatment. If, on the other hand, this Court feels unable to reach the merits in *Preseault*, because of some perceived procedural problem, then the case at bench might provide an appropriate vehicle for this Court to resolve the important issues in this case.

The "rails-to-trails" program and the rights of many citizens await this Court's answers to the Constitutional questions.

Respectfully submitted,

FADEM, BERGER & NORTON

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Attorneys for Petitioners

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Respondents.

STATE OF CALIFORNIA)
) ss:
COUNTY OF LOS ANGELES)

Esiquia Gonzales being first duly sworn, deposes and says: I am a citizen of the United States and a resident of or employed in the county aforesaid. I am over the age of 18 years and not a party to the said action. My business addresss is 3550 Wilshire Blvd., Suite 916, Los Angeles, California 90010. On this date, I served the within PETITIONERS' REPLY BRIEF on the interested parties in said action by placing three true copies thereof with first-class postage fully prepaid, in the United States post office mailbox at Los Angeles, California, in sealed envelopes addressed as follows:

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That affiant makes this service, for MICHAEL M. BERGER, Counsel of Record, of FADEM, BERGER & NORTON, Attorneys for Petitioners herein, and that to the best of my knowledge all persons required to be served in said action have been served.

Esiquia Gonzales
Esiquia Gonzales

On December 28, 1989, before me, the undersigned, a Notary Public in and for said County and State, personally appeared Esiquia Gonzales, known to me (or proved to me on the basis of satisfactory evidence) to be the person whose name is subscribed to the within instrument, and acknowledged to me that she executed the same.

WITNESS my hand and official seal.

OFFICIAL SEAL
Theodore Matsuo Wilden
NOTARY PUBLIC - CALIFORNIA
LOS ANGELES COUNTY
My comm. expires NOV 30, 1990

Theodore Matsuo Wilden
Notary Public in and for
said County and State